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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

USX CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Eleventh Circuit err in holding—in conflict with the Fifth and First Circuits—that a federal district court is powerless to enforce a labor arbitration award directing a party to a collective bargaining agreement to cease and desist from continued violations of the agreement?

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PETITION FOR WRIT OF CERTIORARI

The United Steelworkers of America, AFL-CIO-CLC, hereby petitions for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *United Steelworkers of America, AFL-CO-CLC v. USX Corporation*, 966 F.2d 1394 (11th Cir. 1992).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 966 F.2d 1394 (11th Cir. 1992), and is reproduced as Appendix A (1a-24a). The judgment of the Court of Appeals is reproduced as Appendix B (25a-26a). The October 14, 1992, order of the Court of Appeals denying the petition for rehearing with suggestion for rehearing *en banc* is reproduced as Appendix H (47a-48a).

The opinion of the United States District Court for the Northern District of Alabama, dated March 15, 1990, is reported at 115 Lab. Cas. ¶ 10037 (N.D. Ala. 1990), and is reproduced as Appendix C (27a-32a). The injunction issued by the district court, also dated March 15, 1990, is unreported and is reproduced as Appendix D (33a-34a). The April 3, 1990, opinion of the district court granting defendant's motion to alter, amend, or vacate the court's March 15, 1990, injunction is unreported and is reproduced as Appendix E (35a). The district court's amended injunction, also dated April 3, 1990, is unreported and is reproduced as Appendix F (36a-37a).

The Arbitration Award issued by the Board of Arbitration on February 7, 1989, is unreported and is reproduced as Appendix G (38a-48a).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit were issued on July 24, 1992. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on October 14, 1992. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

The United States District Court for the Northern District of Alabama had jurisdiction over this case under section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. The Eleventh Circuit had jurisdiction of this case pursuant to 28 U.S.C. § 1292(a)(1).[1]

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[1] The Eleventh Circuit was uncertain whether the district court had issued a "final decision"—in which case the Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291—or a preliminary injunction—in which case the Eleventh Circuit had jurisdiction under 28 U.S.C. § 1292(a)(1). But the court declined to resolve this question "[s]ince jurisdiction exists under either section 1291 or 1292, and since our resolution of the merits . . . makes any differences in review irrelevant." App. 12a.

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Respondent USX Corporation ("USX" or "the Company") has repeatedly violated a provision in its collective bargaining agreement with petitioner United Steelworkers of America ("USWA" or "the Union"), requiring USX to provide prior notice to the Union of the contracting out of bargaining-unit work. A Board of Arbitration ordered USX to cease and desist from further violations of this provision. When USX failed to comply with the cease-and-desist order, the Union sought and obtained an injunction from a federal district court directing USX to comply with that order. The Eleventh Circuit held that the district court was without power to issue that injunction.

The relevant details are as follows:

1. The Union is the exclusive bargaining representative of all basic steel production and maintenance employees of respondent USX at the Company's Fairfield Works in Jefferson County, Alabama. USX and USWA were, at all times relevant here, parties to a collective bargaining agreement known as the 1987 Basic Labor Agreement ("the Agreement"), covering numerous steel plants including the Fairfield Works.

Section 2-C of the Agreement governs the contracting out of bargaining-unit work.[2] This section has two principal components. First, section 2-C-A imposes strict substantive restrictions on the contracting out of work. App. 50a.[3] Second, and most relevant here, section 2-C-E requires USX to provide the Union with *prior notice* that USX has decided to contract out an item of work, unless an emergency situation does not allow for such prior notice. App. 55a-57a.

The purpose of the prior-notice provision of section 2-C-E, as stated in the Agreement, is to provide the Union "a reasonable opportunity to suggest and discuss [with USX] practical alternatives to contracting out." App. 57a. To further that end, the parties have established at each plant a joint Contracting Out Committee, which is authorized to "attempt to resolve problems in connection with the operation, application and administration of the [contracting-out] provisions." App. 54a. Timely advance notice is the *sine qua non* of effective implementation of the parties' agreement on the contracting out of bargaining unit work. If the Union does not receive such notice, the Union has no opportunity to convene a meeting of the Contracting Out Committee, and thus no opportunity to persuade the Company in advance that the Company either is barred by the agreement from contracting out the work in question, or should not contract out that work even though it has the right to do so under the agreement. *See* App. 55a-56a.

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[2] Section 2-C of the Agreement is reproduced as Appendix I (49a-61a).

[3] Specifically, USX may not contract out any work for performance inside or outside the plant unless it demonstrates that the work falls within certain specific and narrowly defined exceptions. App. 50a. The main exceptions to the substantive prohibition on the contracting out of work require USX to establish "that it is more reasonable [based on eleven criteria specified in the contract] for the Company to contract out such work than to use its own employees." App. 50a-52a.

The Union is entitled under the Agreement to arbitrate the Company's failure to provide prior notice of contracting out. App. 56a-58a. Arbitrations are conducted by a permanent Board of Arbitration jointly selected by the parties. The Agreement authorizes the Board, upon finding a violation of the notice provision, "to fashion a remedy, at its discretion, that it deems appropriate to the circumstances of the particular case." App. 57a.

2. This case arose from three grievances in which the Union alleged that USX improperly failed to provide prior notice of contracting out work at the Fairfield Works facility. These grievances were taken to final and binding arbitration before the Board of Arbitration, in accordance with Section 2-C-E of the Agreement.

Before the Board of Arbitration, the Union pointed to the fact, acknowledged in the Board's opinion, that "this is not the first time that the Board has been faced with a failure to give notice in contracting out situations at Fairfield Works." App. 42a. Accordingly, the Union urged the Board to issue a cease-and-desist order "requiring that the Company hereafter provide notice of contracting out." *Id.* The Board, per Chairman Alfred C. Dybeck, found such a remedy to be appropriate in the circumstances presented, and thus issued the following award:

> The grievances are sustained to the extent set forth in Findings. The Company is ordered to hereafter provide notice of contracting out as required by Section 2-C. [App. 46a.]

In issuing this award, the Board of Arbitration emphasized that the Company's compliance with the prior-notice provision was critical under the Agreement:

> The notice provisions not only afford the Union knowledge of the contracting out but also provide the framework within which the Parties can consider the contractual issues that may arise under the notice.

> With no notice whatsoever, no such framework exists . . . . [App. 43a.]

3. Notwithstanding the Board of Arbitration's cease-and-desist order, USX persisted in failures to provide prior notice of contracting out as required by Section 2-C of the Agreement. The Union brought claims of failure to provide prior notice to arbitration on numerous occasions, and obtained at least nine separate rulings from the Board finding USX in violation of the notice provision.[4] In two of those rulings, the Board admonished the Company for ignoring the Board's prior cease-and-desist order.[5]

Faced with this recidivist behavior by USX, the Union filed an action in federal court under section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, seeking an order in the form of an injunction to enforce the Board's cease-and-desist award. On cross-motions for summary judgment, the district court granted the Union's requested order, finding that

> USX itself has admitted both in grievance proceedings regarding actions taken after Arbitrator Dybeck issued his [cease-and-desist] order and in its briefs and affidavits submitted to this court that it has violated the requirements of Section 2-C. USX's admitted failure to comply with Section 2-C in some circumstances since Arbitrator Dybeck issued his order shows that USX has, in fact, violated Arbitrator Dybeck's order. [App. 31a (citations to the record omitted).] [6]

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[4] *See* Eleventh Circuit Record, Document No. R1-10, Adams Affidavit (Exhibit C at 6-7; Exhibit D at 2-3; Exhibit E at 3-4; Exhibit F at 3; Exhibit G at 6; Exhibit H at 8; Exhibit I at 3-4; Exhibit J at 4-5); Document No. R1-12, Davis Supplemental Affidavit (Exhibit N at 12-18).

[5] *See* Eleventh Circuit Record, Document No. R1-10, Adams Affidavit (Exhibit D at 2; Exhibit E at 3).

[6] The order issued by the district court essentially tracked the language of the notice requirement of Section 2-C-E of the

In determining to issue the order, the district court applied the test developed by the Fifth Circuit in *Oil, Chemical & Atomic Workers v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. Unit A May 1981). App. 30a-32a. In particular, the district court stated that "this Court will require the Union to satisfy the *Ethyl* test before it will issue any contempt citation pursuant to this injunction." App. 32a.

4. On appeal, the United States Court of Appeals for the Eleventh Circuit vacated the injunction. In a footnote at the outset of its discussion of the propriety of the injunction, the court purported to distinguish *Ethyl Corp.*:

> In our view, *Ethyl Corp.* is inapposite. The court, there, assumed that the arbitrator's award was legal; here, as we explain in subpart II.A., the arbitrator's award is invalid. Similarly, the court in *Ethyl Corp.* assumed that the union had no adequate remedy at law; here, as we explain in subpart II.B., the remedy at law is adequate. [App. 9a-10a n.13.]

Agreement. *See* App. 33a-34a. On April 3, 1990, the district court amended the order, but the amendment simply conformed the language of the order more closely to the language of section 2-C-E of the Agreement. App. 35a-37a. As amended, the court's order provides, in pertinent part, as follows:

> Before it finally decides to contract out an item of work at the Fairfield Works, USX will provide notice of such intention to the Union members of the contracting out committee. Unless the item of work is one previously identified by the parties as a shelf item or involves day-to-day maintenance and repair work and service, such notice will be given not less than 25 days before the work is to be done, unless emergency situations do not permit it. Such notice shall be in writing and shall be sufficient to advise the Union members of the committee of the location, type, scope, duration and timetable of the work to be performed so that the Union members of the committee can adequately form an opinion as to the reasons for such contracting out. Such notice shall generally contain the information set forth below. . . . [App. 36a-37a (footnote and specification of information required in notice omitted).]

The court found that the Board of Arbitration's cease-and-desist order did not "draw[] its essence" from the collective bargaining agreement and was therefore "invalid," because the Agreement provides for resort to the arbitration process rather than the federal courts as the means for resolving all contracting-out disputes. App. 19a-20a. And, the Eleventh Circuit found that the Union could obtain "an adequate remedy at law" for future violations of the notice provision by reason of its right to initiate new arbitration proceedings. App. 20a-24a.

REASONS FOR GRANTING THE WRIT

Arbitration awards directing a party to a collective bargaining agreement that has repeatedly violated a particular provision of the agreement to cease and desist from future violations of that provision are becoming increasingly common. The question whether such prospective awards may be judicially enforced implicates issues regarding the respective roles of the courts and of arbitrators in our system of labor arbitration that go to the core of the federal labor policy. In the instant case, the Eleventh Circuit has adopted an approach to this question that is fundamentally opposed to the approach adopted by the Fifth Circuit in *Oil, Chemical & Atomic Workers v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. Unit A May 1981), and by the First Circuit in *Boston Shipping Ass'n v. International Longshoremen's Ass'n*, 659 F.2d 1 (1st Cir. 1981).

The Fifth and the First Circuits have determined that the federal labor policy requires that prospective labor arbitration awards, like other labor arbitration awards, be judicially enforceable. These circuits have reasoned that, in the absence of judicial enforcement, the determination of the arbitrator to issue a cease-and-desist award would be without practical effect, and the issuance of the award would be a futile exercise. The Fifth and First Circuits, therefore, provide for judicial enforcement of such awards whenever there is an indisputable violation of the arbitrator's cease-and-desist order.

The Eleventh Circuit, on the other hand, has determined that the federal labor policy mandates the opposite conclusion: *viz.*, that prospective arbitration awards are *not* judicially enforceable. The court below reasoned that judicial enforcement of an arbitrator's cease-and-desist award would effect a judicial usurpation of the arbitrator's role by allowing a party to a collective bargaining agreement to bring disputes under the agreement to a court rather than to an arbitrator.

Not surprisingly, these diametrically opposed understandings of the federal labor policy lead to irreconcilable results. The order of the district court in the instant case, which was vacated by the Eleventh Circuit, was carefully and explicitly tailored to meet the standard in *Ethyl Corp.*; that order would most certainly have been upheld under the terms of the rule adopted in the Fifth and First Circuits.

This absence of uniformity is the very outcome Congress sought to avoid in enacting section 301 of the LMRA. Section 301 is "a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985). It follows that the "interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given to a contract phrase or term be subject to uniform federal interpretation." *Id.* at 211. The circuit conflict we detail here defeats those statutory interests.

I.

A. In *Ethyl Corp.*, the Fifth Circuit considered in depth the dilemma posed by the issue of the judicial enforceability of cease-and-desist orders in labor arbitration awards. That discussion serves to frame the issue presented by this petition.

On the one hand, the *Ethyl Corp.* court recognized that a federal court's refusal to issue an injunction requiring compliance with an arbitrator's cease-and-desist order would "convert the previous arbitration in this case—and, perhaps, the process of arbitration in general—into a futile and meaningless charade." 644 F.2d at 1048. Absent such an injunction, a recidivist employer or union could continue to violate the collective bargaining agreement even in the face of an arbitrator's cease-and-desist order, and in so doing compel the other party to initiate a new arbitration—with its attendant burdens and costs—on the occasion of each such violation. *Id.* at 1049 & n.8. As the court explained:

> [The] cycle is as vicious as it is endless; by both its viciousness and its endlessness, the cycle presents a grave threat to the survival of the process of labor arbitration. [*Id.* at 1049 (internal quotations omitted).]

On the other hand, the *Ethyl Corp.* court understood that a federal court injunction requiring compliance with an arbitrator's cease-and-desist order could, in certain circumstances, have the perverse result of "usurping the role of the arbitrator." *Id.* at 1049. This usurpation could occur, for example, in circumstances where the contractual provision addressed by the arbitrator's cease-and-desist order is subject to agreed-upon exceptions.[7] In such circumstances, a court could grant and enforce an injunction only after determining that the conduct alleged to be in violation of the arbitrator's cease-and-desist order did not fall within any of the contractual exceptions—a determination that should ordinarily be made by an arbitrator and not a federal court. 644 F.2d at 1049. This displace-

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[7] In *Ethyl Corp.*, for instance, the collective bargaining agreement prohibited the placement of supervisors in hourly-rated jobs except as necessary to preserve plant safety, provide instruction to the employees, or conduct research and development. *Id.* Here, similarly, USX is required by the collective bargaining agreement to provide prior notice of contracting out in all circumstances except *bona fide* emergencies. *See supra*, p. 4.

ment of the arbitrator by the federal court would "present[] a grave threat to the survival of the process of labor arbitration." *Id.*

To avoid either rendering an arbitrator's cease-and-desist order "a futile and meaningless charade," or "usurping the role of the arbitrator," the Fifth Circuit in *Ethyl Corp.* "devis[ed] a format for judicial intervention which w[ould] best accommodate these competing interests." *Id.* at 1050. Thus, *Ethyl Corp.* states the following test: to obtain and enforce an injunction requiring compliance with an arbitrator's cease-and-desist order, the plaintiff must establish "that the current conduct *inarguably* falls within the prohibition that was the subject of the previous arbitration award." *Id.* at 1052 (emphasis added). As the Fifth Circuit noted, "this new course best preserves the integrity of the labor arbitration process and fosters the time-tested wisdom of the Supreme Court's Steelworker's trilogy." *Id.* at 1055.[8]

B. In *Boston Shipping*, the First Circuit adopted and followed the *Ethyl Corp.* rule. After setting forth in detail the facts, the reasoning, and the holding of *Ethyl Corp.*, the court in *Boston Shipping* stated:

> We think this analysis is instructive in the similar situation presented here. Unlike the award in the [*Ethyl Corp.*] case, the present award was not expressly directed at future "like" violations. But, because the subject of the award was not a discrete historical incident but rather the definition of a physical location, it need not have been so directed; the award was inherently prospective. . . . The issue, then, to reformulate the union's position, is whether the prior

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[8] The *Steelworkers* trilogy is *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). These cases set forth the basic elements of the federal labor policy favoring arbitration.

> award may be enforced [by a federal court] in a future situation with a single perhaps arguable difference—a new collective bargaining agreement. We think so. [659 F.2d at 4.]

The First Circuit reaffirmed *Boston Shipping* in *Derwin v. General Dynamics Corp.*, 719 F.2d 484 (1st Cir. 1983). Citing both *Boston Shipping* and *Ethyl Corp.*, the First Circuit summarized the legal standard for judicial enforcement of prospective arbitration awards as follows:

> Only where an arbitral award is both clearly intended to have a prospective effect and there is no colorable basis for denying the applicability of the existing award to a dispute at hand, will a court order compliance with the award rather than require the parties to proceed anew through the contract grievance procedure. [719 F.2d at 491.] [9]

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[9] The Sixth and Second Circuits have, in *dicta*, cited approvingly to the approach followed by the Fifth and First Circuits in *Ethyl Corp.* and *Boston Shipping*. *See United Paperworkers v. Georgia Pacific Corp.*, 798 F.2d 172, 173-74 (6th Cir. 1986) (noting that the Fifth Circuit in *Ethyl Corp.* "has clarified the judicial role" in enforcing prospective arbitration awards, and that the First Circuit in *Boston Shipping* has made clear that the propriety of such judicial enforcement "does not depend upon express language in the award itself"); *International Chemical Workers Local 227 v. BASF Wyandotte Corp.*, 774 F.2d 43, 46 (2d Cir. 1985) ("As the Court of Appeals for the First Circuit has stated, 'unless it is beyond argument that there is no material factual difference between the new dispute and the one decided in the prior arbitration that would justify an arbitrator's reaching a different conclusion, the case must go to fresh arbitration rather than to the court for judicial enforcement.'") (quoting *Derwin, supra*, and citing *Ethyl Corp.*).

And the Seventh Circuit, also in *dictum*, has embraced an approach to the issue that is substantially similar to that of the Fifth and First Circuits, without expressly agreeing or disagreeing with the "inarguable violation" test adopted by those circuits. *See United Mine Workers Local 1545 v. Inland Steel Coal Co.*, 876 F.2d 1288, 1295 (7th Cir. 1989) (judicial enforcement of prospective labor arbitration awards is appropriate only where the facts of the arbitration awards are " 'substantially identical' to the facts in the other

C. In contrast to the decisions of the Fifth and First Circuits, the decision below is predicated on an understanding that the federal labor policy in favor of arbitration precludes a federal court from enforcing an arbitrator's cease-and-desist order where—as is generally the case with respect to collective bargaining agreements, and as was the case in *Ethyl Corp.* and *Boston Shipping*—the parties to a labor contract have agreed to submit disputes over violations of that contract to final and binding arbitration. According to the court below, permitting judicial enforcement of an arbitral order of this type is inappropriate because doing so would give "the union the option of substituting the federal courtroom for the arbitrator's hearing room as the forum for resolving [such] disputes." App. 12a-13a.[10]

This conclusion and the rationale by which it is reached cannot be reconciled with the conclusion and the rationale of *Ethyl Corp.* and *Boston Shipping.* The Eleventh Circuit's efforts to distinguish *Ethyl Corp.* are not based on any factual differences between the two cases, but are a reflection of the different judgments the courts involved have made about the lessons to be drawn from the federal labor policy for the issue whether prospective arbitration awards may be judicially enforced.

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grievances not yet submitted to arbitration," and the contracting party against whom enforcement is sought has engaged in conduct that " 'constitutes wilful and persistent disregard of the arbitration awards.' ") (quoting *United Electrical Workers of America v. Honeywell, Inc.*, 522 F.2d 1221, 1227 (7th Cir. 1975)).

[10] *See also* App. 14a ("the district court's injunction will effectively abolish arbitration as the mechanism for resolving future contracting-out disputes"); App. 19a ("what the [district] court has done [in enforcing the arbitrator's cease-and-desist order] . . . is give the Union the option of going to arbitration or going to court"); App. 20a ("The arbitrator's award . . . as interpreted, and enforced, by the district court, gives the Union the right to ignore the Company's demand for arbitration and to sue for injunctive relief.").

To be sure, the court below asserted that here, unlike in *Ethyl Corp.*, the arbitrator's award is "invalid," App. 9a-10a n.13, because the award does not "draw its essence" from the Agreement. *See* App. 19a-20a. But, on inspection, that assertion is erroneous as a matter of law and cannot serve as the basis for distinguishing *Ethyl Corp.*

The arbitration award here does no more than direct the Company to comply with the express terms of the Agreement: USX is "to hereafter provide notice of contracting out as required by Section 2-C" of the collective bargaining agreement. *See supra*, p. 5. And, there can be no question as to the Board of Arbitration's authority to issue such an award: the Agreement empowers the Board "to fashion a remedy, at its discretion, that it deems appropriate to the circumstances of the particular case." *Id.* It is not surprising that the Company conceded in the courts below that the arbitration award here "draws its essence" from the Agreement.[11]

In reaching the opposite conclusion, the court below relied entirely on what it perceived to be the inherent inconsistency between the grievance-arbitration provision of the contract, which permits "both parties to demand, and obtain, the arbitration of contracting-out disputes," App. 20a, and the Board of Arbitration's cease-and-desist award, which, if enforced by a court, would "give[] the Union the option of going to arbitration or going to court." App. 19a. That perception, however, does *not* serve to distinguish this case from *Ethyl Corp.* To the contrary, that perception serves only to reveal the conflict that in fact exists between the approach of the court below and the

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[11] In its complaint, the Union alleged that the arbitration award "draws its essence from the collective bargaining agreement and is a final, binding and valid award." Eleventh Circuit Record, Document No. R1-1, at 4 ¶ 12. That allegation was admitted by the Company in its answer to the complaint. Document No. R1-2, at 2 ¶ 12. That allegation was likewise admitted by the Company in its brief to the Eleventh Circuit. *See* Brief of Appellant USX Corporation in Case No. 90-7313, at 3 ("the Company accepts [the arbitrator's award] as final and binding").

approach of the Fifth Circuit in *Ethyl Corp.* By definition, the latter court found no inherent contradiction between a final and binding arbitration clause and court enforcement of an arbitrator's cease-and-desist award.[12]

The Eleventh Circuit's additional assertion that the Union here had an "adequate remedy at law"—*viz.*, a backpay remedy through the arbitration process, *see* App. 10a n.13, 20a-24a—again does not serve to distinguish this case from *Ethyl Corp.* Indeed, *Ethyl Corp.* held directly to the contrary on this point. *Ethyl Corp.* found that repeated invocation of the arbitral process is *not* an adequate remedy where, as here, one party to the labor agreement repeatedly and persistently violates the agreement and flouts an arbitrator's order to cease and desist from further violations. *See Ethyl Corp., supra,* 644 F.2d at 1049 (requiring repeated arbitrations under such circumstances would create an "endless" and "vicious" cycle that "presents a grave threat to the survival of the process of labor arbitration"). Again, rather than provide the basis for distinguishing *Ethyl Corp.*, this point highlights the conflict in approach between the two cases.

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[12] In this respect, the decision below is also in conflict with the numerous decisions of this Court holding that labor arbitration awards are entitled to great deference from the courts, particularly with regard to the arbitrator's selection of remedies. This Court has repeatedly held that "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect." *United Paperworkers v. Misco,* 484 U.S. 29, 38 (1987). *See also e.g., United Steelworkers v. Enterprise Wheel, supra,* 363 U.S. at 597:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

II.

The issue of the proper scope of a federal court's power in an action under section 301 of the LMRA to enforce a cease-and-desist order in a labor arbitration award is a recurring one on which, as we have shown, the circuit courts are in conflict. Because such arbitral cease-and-desist orders are becoming increasingly common, *see* Elkouri & Elkouri, *How Arbitration Works* 291 & n.298 (4th ed. 1985), the resolution of this conflict is of considerable practical importance.

Uncertainty in the law as to this issue results in instability in the processes for enforcing and for negotiating collective bargaining agreements. It is common for unions to negotiate nationwide contracts that cover all of an employer's facilities throughout the country or a number of different employers' facilities throughout the country, or simply to negotiate different contracts containing standard provisions with employers in various sections of the country. For example, the contracting-out provision at issue here (or a close variant of that provision) is applicable in numerous plants of numerous employers across the country. Unless the conflict between the circuits described herein is resolved, arbitral cease-and-desist orders covering certain plants will be enforced by courts, and the same or identical orders covering other plants will not be so enforced.

Such a situation is precisely what Congress intended to avoid by enacting section 301. That section, as we stated at the outset, stands as a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp. v. Lueck*, *supra*, 471 U.S. at 209. The conflict among the circuits on the issue presented here is inimical to the statutory interest in uniformity.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-7313

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff-Appellee,

v.

USX CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

July 24, 1992

Michael L. Lucas, Burr & Forman, Birmingham, Ala., S.G. Clark, Law Dept., USX Corp., Pittsburgh, Pa., for defendant-appellant.

Jerome A. Cooper, Joe R. Whatley, Jr., Cooper, Mitch, Crawford, Kuykendall & Whatley, Birmingham, Ala., Carl B. Frankel, Rudolph L. Milasich, Jr., Legal Dept., United Steelworkers, Pittsburgh, Pa., for plaintiff-appellee.

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and PECK *, Senior Circuit Judge.

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* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

TJOFLAT, Chief Judge:

This appeal is from an injunctive order enforcing an arbitration award entered under a collective bargaining agreement. The award, and therefore the injunction, directs the employer to comply with the provision of the collective bargaining agreement that requires the employer to notify the union before contracting out work to be performed in the employer's shop. We vacate the injunction because the award it enforces is not "drawn from the essence" of the labor contract as required by law, *see United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960), and, alternatively, because an adequate remedy exists at law.

I.

The employer in this case, USX Corporation (USX or the Company), is a manufacturer of steel products. The union, United Steelworkers of America (the Union), is a labor organization that represents employees in the steel industry. On February 1, 1987, USX and the Union entered into a collective bargaining agreement (the labor agreement or the agreement) that governs USX's employment of production and maintenance workers at the Company's steel-manufacturing and by-product coke facilities.[1]

The labor agreement requires USX to employ the Union's members in the performance of the Company's production and maintenance work at these facilities; this ban does not apply, however, to maintenance work

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[1] The collective bargaining agreement defines "employees" as

> all individuals occupying production [and] maintenance . . . jobs employed in and about the Company's steel-manufacturing and by-product coke plants for which units the Union is, or may be during the life of this Agreement, certified by the National Labor Relations Board as the exclusive collective-bargaining representative.

that, prior to March 1, 1983, USX had, as a "consistent practice," contracted out.[2] When USX decides to let a contract for the performance of work at a covered facility, the Company must provide the Union with notice of the work unless an emergency situation exists, in which case the Company is exempt from providing prior notice.[3] The purpose of the notice is to give the Union an opportunity to determine whether the noticed contract is for production and maintenance work that the Union's members should perform. If the Union concludes that the proposed contract calls for such work, it may object and, if the matter is not resolved to its satisfaction, file a grievance and invoke the agreement's expedited grievance procedure.[4] Under that procedure, if the

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[2] Under the labor agreement, the production and maintenance work does not include the following: (1) production and maintenance work contracted out with the Union's consent; (2) major construction projects; and (3) the acquisition of "parts and supplies."

[3] Paragraph E of section 2-C of the labor agreement provides in pertinent part:

> E. Notice and Information
>
> Before the Company finally decides to contract out an item of work, the Union . . . will be notified . . . . [S]uch notice will be given in sufficient time to permit the Union to invoke the Expedited Procedure described in paragraph G below [*see infra* note 4], *unless emergency situations do not permit it.* Such notice shall be in writing and shall be sufficient to advise the Union . . . of the location, type, scope, duration and timetable of the work to be performed so that the Union . . . can adequately form an opinion as to the reasons for such contracting out.

(Emphasis added.)

[4] Paragraph G of section 2-C of the labor agreement provides in pertinent part:

> G. Expedited Procedure
>
> In the event that either the Union or Company . . . request[s] an expedited resolution of a grievance arising under this section . . ., it shall be submitted to the Expedited Procedure in accordance with the following:

parties cannot settle the dispute within five days, either side may demand arbitration.

To compensate Union members for wages lost when USX contracts out production and maintenance work (that presumably should be performed by Union members) without notifying the Union, the labor agreement authorizes the arbitrator[5] to fashion any remedy "appropriate to the circumstances of the particular case . . . includ[ing the award of] earnings and benefits to the

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1. In all cases except those involving day-to-day maintenance and repair work and service, or emergencies, the Expedited Procedure shall be implemented prior to letting a binding contract.

2. Unless the parties agree otherwise, within five (5) days (excluding Saturdays, Sundays and Holidays) after the filing of a grievance, if either the Union or Company determines that the grievance cannot be resolved, either party . . . may advise the other party in writing that it is invoking arbitration under this Expedited Procedure and shall notify the Board [of Arbitration]. The party invoking arbitration shall include with its written notice a summary of the facts and arguments relied upon. Within five (5) days (excluding Saturdays, Sundays and Holidays) following receipt of such notice the responding party shall provide the moving party with a written summary of the facts and arguments that it relies upon.

3. An expedited arbitration must be scheduled within five (5) days (excluding Saturdays, Sundays and Holidays) of such notice to the Board [of Arbitration] and heard at a hearing commencing within ten (10) days (excluding Saturdays, Sundays and Holidays) thereafter. The Board, or its appointee, shall hear the dispute.

4. The Board must render a decision within five (5) days (excluding Saturdays, Sundays and Holidays) of the conclusion of the hearing, which decision need only succinctly explain the basis for the findings.

[5] The arbitrator is the Board of Arbitration. We sometimes use the term arbitrator in referring to the Board, its chairperson, or members.

grievants who would have performed the work . . . ." [6] The sums USX might have to pay if it breaches its duty to notify could be substantial. First, USX must pay the contractor hired to do the work. Second, it may have to pay Union employees the wages they would have earned if permitted to do the work. Third, it may have to pay the expenses incurred by the Union in prosecuting its members' grievances. Finally, the arbitrator has discretionary authority to impose additional sanctions "appropriate to the circumstances of the particular case"; we need not speculate, however, as to what such additional sanctions might be.

A.

The incident leading to the arbitration award the district court enforced in this case began in early September 1988, at USX's Fairfield Works, located in Birmignham, Alabama. A blast furnace—which recently had been the subject of a major rebuilding project—malfunctioned, causing "gummy slag," a molten debris that is a byproduct of the smelting process, to run out of the furnace. Because this gummy slag threatened to "freeze up" the furnace, workers were needed immediately to repair and clean-up the furnace and its "runners," i.e., channels through which molten debris travels.

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[6] The "Notice" provision contained in paragraph E of section 2-C of the labor agreement provides, in pertinent part:

> Should it be found in the arbitration of a grievance alleging a failure of the Company to provide the notice . . . required under this paragraph . . . that such notice . . . was not provided, that the failure was not due to an emergency requirement, and that such failure deprived the Union of a reasonable opportunity to suggest and discuss practical alternatives to contracting out, *the Board [of Arbitration] shall have the authority to fashion a remedy, at its discretion, that it deems appropriate to the circumstances of the particular case. Such remedy, if afforded, may include earnings and benefits to the grievants who would have performed the work, if they can be reasonably identified.*

(Emphasis added.)

On September 11, USX, without notifying the Union, directed a contractor to perform the needed repair and clean-up work. By September 17, the furnace was fully operational; a number of the contractor's workers remained on the site after this date, however, performing clean-up work. The Union, on September 21, filed three grievances challenging the use of outside labor on the repair and clean-up work. The Union interpreted the Company's use of outside workers as a violation of the agreement's ban on contracting out production and maintenance work. When the parties failed to resolve the grievances, USX invoked arbitration.

On January 25, 1989, an arbitrator convened a hearing.[7] The Union, to demonstrate that the contracted-out work constituted production and mainenance work for which notice should have been given, produced evidence that, in the past, similar spills had been cleaned up by Union laborers. USX, characterizing most of the disputed repair work as part of the rebuilding of the blast furnace, as opposed to production and maintenance work, defended its use of outside labor as permissible under the agreement.[8] USX also cited the emergency nature of the gummy slag runout as exempting the Company from the notice requirement.[9]

On February 7, 1989, the arbitrator sustained the Union's grievances and issued an award. In his opinion accompanying the award,[10] the arbitrator found that al-

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[7] USX and the Union have developed their own rules of procedure for arbitration of disputes. All Board decisions are subject to approval by the Board's Chairman. The Chairman conducted the January 25, 1989, hearing mentioned in the text.

[8] USX treated the work as a "major construction project," which could be contracted out. *See supra* note 2.

[9] *See supra* note 3.

[10] The arbitration award contains three sections entitled "Background," "Findings," and "Award." The "Award" section, sets forth the relief granted. The "Background" section contains a brief

though an emergency excused USX from notifying the Union when the runout began, the emergency soon abated and USX should have notified the Union of the work it planned to contract out. The arbitrator had insufficient evidence, however, to determine whether any Union members should be compensated for lost wages; accordingly, he left the issue with the parties, granting them leave to return to arbitration if they could not reach a settlement.[11] (The parties subsequently agreed upon an appropriate remedy.) The arbitrator imposed no fine, nor did he give the Union the expenses it incurred in prosecuting its grievance. Apparently, USX's conduct did not warrant such relief. He did, however, order USX "to hereafter provide notice of contracting out as required by Section 2-C" of the labor agreement.

B.

The Union contends that USX has ignored the arbitrator's admonition to comply with section 2-C of the labor agreement and has been contracting out work that

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description of the facts of the dispute. The "Findings" section contains the arbitrator's interpretation of the labor agreement as it applies to the facts of the case. To avoid confusion between the "arbitration award" as a whole and the "Award" section, we refer to the former as the opinion of the arbitrator and to the latter as the award.

[11] Although the arbitrator did not explicitly state that he would determine the damages figure if the parties could not, he implied as much in his stated reason for sending the issue back to the parties; he did not think that enough evidence had been presented to allow him to assess a damages figure. As he explained in his opinion:

> There remains the matter of whether a monetary remedy is appropriate in this case. The evidence seems clear that all available employees were fully employed at the time and working some overtime. Although some overtime figures were submitted in evidence they were not complete. Thus, the matter of remedy will be returned to the Parties to review the availability of employees to have performed the work assigned to the contractor.

should be performed in the plant by Union members. To stop this practice, the Union brought this suit in the United States District Court for the Northern District of Alabama; invoking section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (1988) (the LMRA),[12] the Union asked the district court to enforce the arbitrator's award—that is, to enjoin USX, in the words of the arbitrator, "to hereafter provide notice of contracting-out as required by Section 2-C" of the labor agreement. The Union also sought money damages for the wages its members would have earned had they been permitted to perform certain contracted out work occurring after the arbitration award. USX answered the Union's complaint, denying the Union's alle-

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[12] Section 301 of the LMRA, 29 U.S.C. § 185 provides, in relevant parts:

> (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> . . . .
>
> (c) Jurisdiction
>
> For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.
>
> . . . .

The complaint also alleged jurisdiction under 28 U.S.C. § 1331 (1988), which provides district courts of the United States with original jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States[,]" and 28 U.S.C. § 1337(a) (1988), which provides district courts of the United States with original jurisdiction over civil actions or proceedings "arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

gations and contesting its right to any relief. Thereafter, both parties moved for summary judgment.

In support of its motion, the Union argued that it was entitled to an injunction as a matter of law because USX had demonstrated an unwillingness to abide by section 2-C of the labor agreement; the Union's motion did not address its damages claim. USX, in turn, argued on several grounds that the court should deny the injunction and dismiss the case. First, the Union had met none of the traditional prerequisites for injunctive relief: for example, the Union failed to show that its legal remedy was inadequate, or that it needed an injunction to avoid irreparable harm. Second, the Union had not satisfied the other requirements for an injunction laid down by the Norris-LaGuardia Act, ch. 90, § 7, 47 Stat. 71, 29 U.S.C. § 107 (1988). Lastly, USX argued that the granting of an injunction or money damages would in effect eliminate arbitration as the mechanism chosen by the parties to resolve contracting-out disputes and thus would rewrite their labor agreement.

On March 15, 1990, the district court entered an order granting the Union's motion for summary judgment and the injunctive relief it had requested, denied USX's motion in which it had asked that the complaint be dismissed, and taxed costs against USX. The court found, from the affidavits and other exhibits submitted by the parties, that USX had been disregarding the arbitrator's order to give the Union notice of contracting out in accordance with section 2-C of the labor agreement; the court observed that USX had not given notice, as required, "100% of the time." [13] The court thus rejected

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[13] In the opinion accompanying its order granting the Union injunctive relief, the district court cited *Oil, Chemical & Atomic Workers International Union v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981), as supporting the action the court took. In our view, *Ethyl Corp.* is inapposite. The court, there, assumed that the arbitrator's

the Company's argument that arbitration provided the Union and its members adequate relief and that an injunction was not needed to protect their rights under the agreement. As for USX's argument that the Union had not satisfied the requirements of the Norris-LaGuardia Act, the court, citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), held that these requirements were of no moment; the Act simply did not apply in the circumstances at hand.

After the March 15 order was entered, USX moved the court, pursuant to Fed.R.Civ.P. 59(e),[14] to alter, amend, or vacate the March 15 order, or, in the alternative, to modify certain language in the order. On April 3, 1990, the court granted USX the alternative relief it requested, and modified its injunctive order to read as follows:

> Before it finally decides to contract out an item of work at the Fairfield Works, USX will provide notice of such intention to the Union. . . . *Unless the item of work . . . involves day-to-day maintenance and repair work and service*, such notice will be given not less than 25 days before the work is to be done, unless emergency situations do not permit it. Such notice shall be in writing and shall be sufficient to advise the Union . . . of the location, type, scope, duration and timetable of the work to be performed so that the Union . . . can adequately form an opinion as to the reasons for such contracting out. Such notice shall generally contain the information set forth below:

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award was legal; here, as we explain in subpart II.A., the arbitrator's award is invalid. Similarly, the court in *Ethyl Corp.* assumed that the union had no adequate remedy at law; here, as we explain in subpart II.B., the remedy at law is adequate.

[14] Fed.R.Civ.P. 59(e) states that "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

1. Location of work
2. Type of work:
   a. Service
   b. Maintenance
   c. Major Rebuilds
   d. New Construction
3. Detailed description of the work
4. Crafts or occupations involved
5. Estimated duration of work
6. Anticipated utilization of bargaining unit forces during the period
7. Effect on operations if work not completed in timely fashion.

(Emphasis added.)[15]

C.

The appeal now before us is from the district court's order of April 3, 1990, amending its injunctive order of March 15, 1990.[16] The parties, in their briefs, state that we have jurisdiction pursuant to 28 U.S.C. § 1291 (1988), to review a "final decision" of the district court.[17] As noted, the Union moved for, and the court granted relief on, only the Union's claim for injunctive relief, while USX's summary judgment motion, which addressed both the injunction and damages claims, was denied. Furthermore, while the court taxed costs against USX, no entry of judgment appears in the record. The

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[15] The April 3 order simply added the emphasized text.

[16] In its notice of appeal, USX states that it is appealing from both the order of March 15, 1990, and the order of April 3, 1990.

[17] 28 U.S.C. § 1291 (1988) provides:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ., except where direct review may be had in the Supreme Court.

record reveals no other disposition of the Union's damages claim, suggesting that a "final decision" may not have been reached in the court below.

It is possible that the Union abandoned the damages claim. If so, the court's March 15 order, as amended, "clearly evidences its intent that the . . . order represent[s] the final decision in the case" necessary for jurisdiction under section 1291. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387, 98 S.Ct. 1117, 1121, 55 L.Ed.2d 357 (1978). Alternatively, the parties may have left the matter of damages for a later day. If such is the case, the court granted a preliminary injunction reviewable under 28 U.S.C. § 1292(a)(1) (1988),[18] and subject to less stringent procedural hurdles than those for a permanent injunction reviewable under section 1291. *See* 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 2941, at 361 (1973).

Since jurisdiction exists under either section 1291 or 1292, and since our resolution of the merits in part II, *infra*, makes any differences in review irrelevant, it is not necessary to address whether a final decision was reached.

II.

As noted, after finding for the Union on its grievances, the arbitrator, in his award, ordered the Union "to hereafter provide notice of contracting out as required by Section 2-C" of the labor agreement.[19] In enforcing this

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[18] 28 U.S.C. § 1292(a)(1) (1988) creates jurisdiction from:

> Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .

[19] As noted in the text *supra*, p. 1395, the labor agreement covers only specific types of work. The district court's injunction, however, if taken literally, expands the labor agreement's coverage to include *any* "item of work at the Fairfield Works." We assume that the court did not intend to reach such additional work and that, if

aspect of the award, the district court, in effect, gave the Union the option of substituting the federal courtroom for the arbitrator's hearing room as the forum for resolving contracting-out disputes. The labor agreement, however, does not give the Union this option; rather, the agreement forecloses federal forums by mandating the arbitration of *all* contracting-out disputes. We conclude, in subpart A, that even if the arbitrator intended that his award rewrite the parties' agreement in this fashion, the award is illegal and unenforceable, for it has not been "drawn from the essence" of the labor agreement. *See Enterprise Wheel & Car Corp.*, 363 U.S. at 597, 80 S.Ct. at 1361. Accordingly, the district court's injunction cannot stand.

The court's injunction must be set aside for another, independent reason as well. As we explain in subpart B, the prerequisites for injunctive relief are not present in this case; indeed, the principles of equity preclude such relief.[20]

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called upon to enforce its injunction, would restrict the injunction to conform with the agreement.

The injunction, while tracking for the most part the language of section 2-C, made one significant change. The labor agreement requires the Company to notify the Union of contracting-out "in sufficient time to permit the Union to invoke the Expedited [Grievance] Procedure, unless emergency situations do not permit it." The injunction, however, requires that such notice be given "not less than 25 days before the work is to be done." Given our disposition of the case, we do not consider the propriety of this change.

[20] On appeal, USX contends that the district court disregarded section 7 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. § 107 (1988) by, among other things, entering the injunction on summary judgment. Given the grounds on which we dispose of this appeal, we find it unnecessary to consider whether the Norris-LaGuardia Act barred the entry of the injunction on summary judgment and, if not, whether the presence of genuine issues of material fact did so.

A.

That the district court's injunction will effectively abolish arbitration as the mechanism for resolving future contracting-out disputes becomes clear when one considers what will transpire the next time the Union claims that the Company has let a contract for production and maintenance work without notice, in violation of section 2-C. Posit a situation in which, as here, USX hires a contractor to do clean-up work after a blast furnace malfunctions. USX believes that an emergency exists and therefore does not immediately notify the Union that it has let the contract.[21] In time, the Union discovers the contractor's employees on the job, or receives notice thereof, and, believing that USX has violated the district court's injunction, moves the court to issue an order requiring the Company to show cause why it should not be held in contempt and sanctioned.[22] The Union's motion, the allegations of which the court accepts as true, demonstrates a violation of the injunction; hence, the court issues a show cause order and sets a hearing.

At the hearing, the Union's evidence establishes that USX let a contract for production and maintenance work without notifying the Union as required by the labor agreement, and the court, rejecting USX's argument that the situation constituted an emergency requiring no notice, holds the Company in contempt. At this point, what sanction could the court impose? What remedy could the court fashion to make the Union and its members whole?

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[21] As noted, under the district court's injunctive order, as in section 2-C of the labor agreement, USX need not give the Union advance notice when "emergency situations do not permit it." *See supra* note 3.

[22] The Union takes this action because a civil contempt proceeding is the only lawful means available for enforcing an injunction. *See Mercer v. Mitchell*, 908 F.2d 763, 769 n.10, 770-71 (11th Cir. 1990); *Blalock v. United States*, 844 F.2d 1546, 1558-60 (11th Cir. 1988) (Tjoflat, J., specially concurring).

If, on the one hand, the contracted-out work is not finished, the court could, at least in theory, require USX to give the balance of the work to the Union's members.[23] At the same time, the court could order USX to compensate the Union members who could have done the work already performed for any wages they may have lost. On the other hand, if the work has been finished, or circumstances otherwise preclude the substitution of Union members for the contractor's employees at the job site, the court could require the Company to make whole any Union members who were deprived of the opportunity to do the clean-up work in violation of the agreement.[24] Could the court require the Company to compensate the Union for the attorneys' fees it has incurred in prosecuting the civil contempt proceeding, or, if the law foreclosed such relief, could the court fine USX and direct it to pay the fine to the Union?

An award of attorneys' fees would be highly problematical. The labor agreement makes no provision for the granting of such fees in judicial proceedings to enforce arbitration awards, and we know of no statutorily or judicially created authority that would authorize the court to grant them.[25] To be sure, an arbitrator, if he

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[23] Due process, however, would probably require that the court first make the contractor a party to the proceedings and accord it an opportunity to be heard.

[24] *See, e.g., Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421, 443, 106 S.Ct. 3019, 3033, 92 L.Ed.2d 344 (1986).

[25] The " 'American Rule' prohibits fee-shifting in most cases," *Chambers v. Nasco, Inc.*, —— U.S. ——, ——, 111 S.Ct. 2123, 2133, 115 L.Ed.2d 27 (1991); thus, the Union could not recover its attorneys' fees merely because it prevailed at the civil contempt hearing. There are, however, "narrowly defined circumstances" in which federal courts, in the exercise of their inherent power, can assess fees against counsel or the parties they represent. *Id.* For example, a district court "may assess attorneys' fees for the 'willful disobedience of a court order,' " *id.* (quoting *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 258, 95 S.Ct. 1612, 1622,

believes that an award of attorneys' fees would be "appropriate to the circumstances of the case," [26] may require the Company to reimburse the Union for such expenses; the parties, however, in drafting their agreement, gave this authority to the arbitrator, not to the court.

As for a fine, the court could impose a fine and order it paid to the Union; the court could not do so, however, if the purpose of the fine is to punish USX for violating the injunction.[27] A fine levied to punish a contemnor is a criminal, not a civil, contempt sanction, and, in our hypothetical case, USX has not been charged with criminal contempt. Could the court fine USX as a means of coercing its future compliance with the injunction? Arguably, the court could, but it would be a close question whether, in truth, the purpose of the fine is, instead, to punish USX for its past transgression.

It therefore appears that, in the circumstances we posit, the district court, depending on the status of the contracted-out work, might not be able to make the Union and its members as whole as could an arbitrator—because, as we have observed, *supra* at 1395-98, the discretion the parties have given the arbitrator to fashion an award is much broader than the discretion the law gives the district court to fashion a civil contempt sanction. The question thus arises: could the court, after concluding that USX violated section 2-C's notice provision and holding it in contempt, "remand" the case to

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44 L.Ed.2d 141 (1975)), or "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* (quoting *Alyeska*, 421 U.S. at 258-59, 95 S.Ct. at 1622-23). Thus, the Union probably could recover its attorneys' fees if it established that USX's conduct—in failing to give notice of contracting out—fell within these exceptions.

[26] *See supra* note 6.

[27] *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441-42, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911) (when purpose of sanction is punishment, contempt is *criminal* contempt).

an arbitrator[28] and instruct the arbitrator, drawing on his authority under the labor agreement, to consider the remedies that might be "appropriate to the circumstances of the particular case" and to fashion whatever remedies he deemed appropriate? In theory, the court could do so;[29] but we know of no legal precedent for such a remand.

Assume, nonetheless, that the law would permit the court to remand the task of fashioning a remedy to an arbitrator. Would the arbitrator be bound by the court's conclusion that USX had contracted out production and maintenance work without the requisite notice of the Union? That would depend on the court's instructions to the arbitrator. If the court bound the arbitrator to its conclusion that USX had violated section 2-C's notice provision, would the arbitrator still have discretion to

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[28] The court, acting on a motion to refer the case to arbitration, could place the case in the hands of an arbitrator by compelling the parties to arbitrate, as provided in their labor agreement, the matter of remedies.

[29] We say that the district court could, in theory, take such action because it has the power to compel arbitration at the behest of either party at any stage of a proceeding. *See generally, Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). In the situation we posit, however, the court might have a difficult time reconciling its earlier holding (when it issued the injunction)—that arbitration provided the Union no adequate remedy at law—with its instant holding (following the civil contempt proceeding)—that arbitration did provide the Union an adequate remedy at law, a better remedy, in fact, than any remedy, whether legal or equitable, the court could possibly fashion. The district court might also have a difficult time explaining why the arbitrator should be bound by the court's determination that USX violated section 2-C by not giving the Union notice of the contracting-out. Given the arbitrator's expertise in interpreting the parties' labor agreement in the light of the conditions of the workplace, and the broad license the parties have granted him to fashion appropriate remedies, an expertise and license the district court does not enjoy, one could argue that no explanation the court could give for binding the arbitrator to the court's decision on the notice issue could pass muster on appellate review.

deny the Union and its members relief on the ground that, in the arbitrator's view, the "circumstances of the particular case" warranted no relief?

For example, suppose the arbitrator, after hearing the evidence adduced by the parties on the remedy issue—in particular, evidence the district court had not considered—concluded that the district court had erred; the contracted-out work was not production and maintenance work after all, or, if it was, an emergency excused USX from giving notice. In such a case, the arbitrator would reject the Union's grievance and make no award. The Union, in turn, would have nothing to enforce in the district court. True, the Union could bring suit, but the district court would be powerless to substitute its judgment for that of the arbitrator and grant relief. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 371, 98 L.Ed.2d 286 (1987).

We do not know, of course, what path the district court will follow if, at some future date, the Union seeks a show cause order, the order issues, and, following a hearing, the court holds USX in contempt for violating the injunction. Presumably, the court (1) could decide all of the issues, leaving nothing for resolution by arbitration as provided in the labor agreement, or (2) could decide the question of whether USX violated the injunction and, if the Union prevailed, direct the parties to submit the matter of remedy to arbitration. If the court chose the latter course, it would have to decide whether, on the one hand, to bind the arbitrator to its conclusion that USX failed to give notice as required by section 2-C or, on the other hand, to permit the arbitrator to exercise in full the authority conferred on him by the labor agreement, meaning that the arbitrator could reject the court's conclusion that USX had violated section 2-C. If the court permitted the arbitrator to exercise in full the authority conferred on him by the labor agreement, the injunction served no purpose; for when called to enforce it, the court simply transferred the

controversy to the arbitrator for decision. In this scenario, then, the court is a mere conduit—an expensive, unneeded conduit.

Neither of these courses of action has any support in the law; consequently, the court's injunction cannot stand. Consider the first alternative. The court, following the show cause hearing, decides *all* of the issues; it holds USX in contempt, concluding that it should have notified the Union before letting the contract for the clean-up work, and fashions the remedy, leaving nothing for arbitration. In this scenario, the court arrogates entirely unto itself the role the parties gave the arbitrator when they drafted their labor agreement; thus, the court in effect rewrites the parties' labor agreement. Admittedly, the court has not explicitly stricken the arbitration provision from the agreement; that provision remains extant as a dispute resolution mechanism. What the court has done, however, is give the Union the option of going to arbitration or going to court. The court's stated reason for giving the Union these options is that it is dutifully enforcing an arbitration award.

Federal courts routinely enforce with injunctive orders arbitration awards in labor cases. *See, e.g., Enterprise Wheel & Car Corp.*, 363 U.S. at 597, 80 S.Ct. at 1361. They do so, however, only if the award draws its essence from the labor agreement. *United Paperworkers Int'l Union*, 484 U.S. at 38, 108 S.Ct. at 371. As the Supreme Court has cautioned, the

> arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice . . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's works manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Enterprise Wheel & Car Corp., 363 U.S. at 597, 80 S. Ct. at 1361. Accordingly, we will not enforce an award that

"directly contradicts the express language of the collective bargaining agreement." *Bruno's, Inc. v. United Food & Commercial Workers Int'l Union*, 858 F.2d 1529, 1531 (11th Cir. 1988). In the case at hand, the express language of the labor agreement gives both parties the right to demand, and to obtain, the arbitration of contracting-out disputes. The arbitrator's award, however, as interpreted, and enforced, by the district court, gives the Union the right to ignore the Company's demand for arbitration and to sue for injunctive relief; thus, the award "directly contradicts" that express language.[30] If this is how the arbitrator intended his award to be read, it is obvious that he did not draw the award from the essence of the contract.

The second, alternative course of action available to the court—in which it decides the notice issue and sends the remedy issues to the arbitrator—fails for the same reason: the court enforces an arbitrator's award that has effectively rewritten, and contradicted, the labor agreement.

B.

The district court entered the injunction in this case without giving due deference to the traditional prerequisites for such relief.[31] The principal prerequisite for

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[30] The arbitrator's award does not explicitly give the Union the right to ignore the Company's demand for arbitration. Rather, the award simply admonishes USX to comply with section 2-C of the labor agreement; nothing in the language of the award, or the opinion accompanying it, indicates that the arbitrator contemplated judicial enforcement of the award through the federal court's civil contempt power. The district court, however, in entering the injunction at issue, necessarily concluded that the arbitrator intended such enforcement.

[31] In *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235, 254, 90 S.Ct. 1583, 1594, 26 L.Ed.2d 199 (1970), a suit by an employer for injunction in a labor dispute also committed to arbitration by the collective bargaining agreement made with the union, Justice

injunctive relief is the absence of an adequate legal remedy. In most cases, the applicant establishes this prerequisite by showing that it "will suffer irreparable harm if the court does not intervene. . . ." 11 Wright & Miller, *supra*, § 2944, at 399; *see also supra* note 31; *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 171 (7th Cir. 1988). Here, the Union made no such showing since an adequate remedy exists at law.[32]

Arbitration takes much less time than litigation, and it is considerably less expensive.[33] Under section 2-C of

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Brennan, writing for the Court, set forth some of the factors a federal district court must consider in deciding whether to enter an injunction in such a case:

> [T]he District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches [of the collective bargaining agreement] are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

Id. (quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228, 82 S.Ct. 1328, 1346, 8 L.Ed.2d 440 (1962) (Brennan, J., dissenting), *overruled by Boys Markets*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970)). The same considerations should counsel a federal court in deciding whether to grant a union's application for an injunction compelling the employer to arbitrate a dispute the parties' labor agreement commits to arbitration.

[32] In fact, as the following discussion makes clear, by applying for and obtaining the injunction at issue, the Union has subjected itself, and the Company as well, to great harm—in the form of substantial litigation expenses and considerable delay in the resolution of contracting-out disputes.

[33] Before they settled on arbitration rather than litigation as the mechanism for resolving contracting-out disputes, the parties presumably performed a cost benefit analysis and concluded that arbitration would be far more efficient and less expensive. Moreover, as the Supreme Court has observed,

> the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted produc-

the parties' labor agreement, if a controversy does not settle within five days of the filing of a grievance, either party can demand arbitration; once arbitration is invoked, the other side has five days to respond—with "a written summary of the facts and arguments that it relies upon." Within the same five-day period, an arbitration hearing, to commence within ten days, must be scheduled. Then, after the hearing is concluded, the arbitrator has five days to decide the case. Arbitration under section 2-C was designed to take no more than twenty days—from the demand for arbitration to the arbitration decision.[34]

A federal district court colud not be expected to dispose of a contracting-out dispute in anywhere near the time the parties have allotted for arbitration. Posit, for example, a situation in which the Union discovers that USX has let a contract for production and maintenance work. The contractor is already on the job site, and the Union, believing that USX has breached the labor agreement, wants to stop the work. The labor agreement contains no arbitration provision, however, so the Union has to take its breach of contract claim to court. The Union sues and asks the district court for preliminary and permanent injunctive relief (and for damages—the wages its members, who could have performed the work, have lost to date). The Union immediately seeks a temporary restraining order (TRO) to halt the work, but a TRO does not issue because, the court concludes, the Union's members will not suffer irreparable injury; damages will make them whole. The Union, having failed

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tion under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

United Steelworkers v. Warrior & Gulf Navig. Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960).

[34] *See supra* note 4.

to obtain a TRO, now asks for a preliminary injunction. A considerable amount of time passes, because the Union has to obtain service of process on the contractor [35] as well as USX; meanwhile, the work continues unabated. After service of process is effected and due notice is given, *see* Fed.R.Civ.P. 65(a), a hearing on the Union's application for a preliminary injunction is held. The injunction does not issue, however, because the Union fails to establish two of the four prerequisites for a preliminary injunction: (1) "a substantial threat that [the Union] will suffer irreparable injury if the injunction is not granted" and (2) "that the threatened injury to [the Union] outweighs the threatened harm the injunction may do to [USX]." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983) (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).[36] The Union also fails to obtain a permanent injunction; the contracted-out work is finished and, in any event, the Union has an adequate remedy at law in the form of money damages for the wages its members lost. The Union therefore seeks money damages. Whether the case is tried to the court or to a jury, further delay ensues before the matter is resolved.

In sum, it is clear that the parties' expedited grievance procedure, with its provision for arbitration, provides a far better mechanism for resolving contracting-out dis-

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[35] Due process would require the court to bring the contractor to the proceeding before enjoining it from finishing the contracted-out work.

[36] The other two prerequisites for preliminary injunctive relief are (3) "a substantial likelihood that [the Union] will prevail on the merits" and (4) "that granting the preliminary injunction will not disserve the public interest." *Lambert*, 695 F.2d at 539 (quoting *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)). The later of these prerequisites may also be violated in this case. *See* Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. § 108 (1988) (stating public policy favors arbitration of labor disputes).

putes than the district court's civil contempt proceeding.[37] Requiring the Union to resort to arbitration instead of civil contempt will certainly cause the Union no irreparable injury; on the contrary, the Union should receive considerable benefit—a greater benefit than it could ever receive from a civil contempt adjudication. As the parties contemplated when they entered into the labor agreement, the Union cannot repair to the courthouse unless, following arbitration and the receipt of an award calling for the payment of money or the performance of a *specific act* by USX, the Company fails to honor the arbitrator's decision. If the Company fails to comply, the Union can sue and enforce the award—by obtaining a money judgment or an injunctive order.[38]

III.

In conclusion, we set aside the district court's injunctive order because (1) it enforces an arbitration award (if, indeed, it is an arbitration award) that is illegal, and (2) the Union has an adequate remedy at law. The case is REMANDED for proceedings in accordance with this opinion.

IT IS SO ORDERED.

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[37] The district court chose the civil contempt proceeding as the mechanism for resolving contracting-out disputes when it entered the injunction at issue; the civil contempt proceeding is the only lawful means available for enforcing injunctive orders. *See supra* note 22.

[38] This discussion, in subpart B, reinforces our conclusion, in subpart A, that the arbitrator's award—which orders USX "to hereafter provide [the Union] notice of contracting out as required by Section 2-C" of the labor agreement—was not drawn from the essence of the labor agreement. In other words, it cannot reasonably be said that the parties, having chosen the most efficient and inexpensive means of resolving contracting-out disputes—arbitration—meant to subject themselves to the financially burdensome and time-consuming means—the civil contempt proceeding—the district court considers the arbitrator to have chosen.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7313

D.C. Docket No. CV89-1483-S

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff-Appellee,
versus

USX CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and PECK *, Senior Circuit Judge.

JUDGMENT

[Filed July 24, 1992]

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

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* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED THAT plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 24, 1992
For the Court:
MIGUEL J. CORTEZ
Clerk

By: /s/ David Maland
Deputy Clerk

Issued as Mandate: Oct. 26, 1992

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Case No. CV 89-P-1483-S

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff,

-vs.-

USX CORPORATION,
Defendant.

OPINION

[Entered March 15, 1990]

United Steelworkers of America, AFL-CIO-CLC, ("the Union") filed this action against USX Corporation ("USX") on August 28, 1989, alleging USX failed to comply with the Collective Bargaining Agreement entered into by the parties in 1987. Specifically, the Union asserts USX has not obeyed a February 7, 1989 order of Arbitrator Dybeck "to hereafter provide notice of contracting out as required by Section 2-C [of the Collective Bargaining Agreement]" at its Fairfield Works. The Union seeks injunctive and monetary relief.

Both parties have filed motions for summary judgment. The Union asserts that if an injunction does not issue the power of arbitration will be lost and our whole system of labor-management relations will collapse. USX asserts the issue of whether it has complied with Arbitrator Dybeck's award at the Fairfield Works and, if not, what the remedy should be, is an issue that should be

decided in arbitration—for the same reasons. In addition, USX argues that (1) an injunction would place a heavy burden on this court by allowing the Union to bring numerous requests for contempt citations; (2) the injunction requested is too broad to satisfy the requirements of Fed. R. Civ. P. 65; and (3) the Norris-LaGuardia Act requires a hearing before an injunction can issue. The court will address the last three arguments first.

1. *Necessity for an Evidentiary Hearing pursuant to the Norris-LaGuardia Act*

Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (1932), provides:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered.

USX asserts this section precludes issuance of an injunction for the Union as part of a summary judgment because there has been no evidentiary hearing. In 1957, however, the Supreme Court held "[t]he Congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-LaGuardia Act." *Textile Workers Union v. Lincoln Mills of Alabama*, 77 S.Ct. 912, 919 (1957). In *Lincoln Mills*, the company had refused to go to arbitration despite the Union's request that it do so and the provision in the Collective Bargaining Agreement requiring the parties to submit to arbitration. Here, the union alleges not that USX refused to go to arbitration, but rather that, having gone through arbitration and lost, USX

failed to comply with the order of the arbitrator. While there is some difference between the two situations, this court is of the opinion that the holding in *Lincoln Mills* applies here: where a party to an agreement to arbitrate is charged with failure to abide by the arbitrator's decision, the congressional policy in favor of arbitration obviates the need to comply with § 7 of the Norris-LaGuardia Act.

2. *Compliance with Rule 65(d)*

Rule 65(d) of the Federal Rules of Civil Procedure requires that an order granting an injunction "be specific in its terms" and "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." USX argues that the Union's proposed order is not sufficiently specific to satisfy Rule 65(d) and suggests that it is impossible to draft an injunction which would satisfy the requirements of Rule 65(d) in this circumstance. The Union has proposed an order which states in part:

> [I]t is ORDERED, ADJUDGED and DECREED as follows:
>
> 1. The Court is hereby confirming and enforcing the award in Arbitration Case Nos. 26,733, 26,734 and 26,735 which award was made by Alfred C. Dybeck, Chairman, Board of Arbitration, on February 7, 1989. Accordingly, USX is ORDERED to hereafter provide notice of contracting out at the Fairfield Works as required by Section 2-C of the Collective Bargaining Agreement between the parties

The court is concerned that by incorporating by reference the terms of Section 2-C such an injunction would run afoul of the requirements of Rule 65(d). The court is of the opinion, however, that an injunction which itself includes the provisions of Section 2-C would not run afoul of Rule 65(d).

3. *Burden on the Court*

USX argues the court should not issue an injunction because to do so would allow the Union to bring numerous actions for contempt, placing a heavy burden on the court. While the burden imposed on the court is of some concern, it is a problem properly dealt with by limiting the scope of the injunction rather than by denying the injunction.

4. *Whether an Injunction Should Issue*

USX couches its remaining arguments in terms of jurisdiction. The real issue, however, is not whether the court has the power to issue the requested injunction, but whether it should do so in these circumstances. *See Oil, Chemical & Atomic Workers International Union v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981) (hereinafter "*Ethyl*").

In 1987, USX and the Union entered into a Collective Bargaining Agreement which, by its terms, remains in effect through February 1, 1991. Section 2-C of this agreement requires USX to provide the Union with notice of its intention to hire outside contractors to perform work which normally could be done by union members. Although there are exceptions, "such notice will be given in sufficient time to permit the Union to invoke the Expedited Procedure described in paragraph G [of the Collective Bargaining Agreement]". Since the Collective Bargaining Agreement went into effect, the Union has filed several grievances asserting that USX contracted out jobs at the Fairfield Works which should have been given to Union members and failed to comply with the notice requirement of Section 2-C at the Fairfield Works. In many, but not all, of these grievances, the arbitrators found for the Union. Finally, in 1989, the Union asked Arbitrator Dybeck to issue an order requiring the company to comply with Section 2-C. The request was made when Arbitrator Dybeck had before him three

grievances in which the Union asserted that USX had not complied with section 2-C. Arbitrator Dybeck concluded that in all three grievances USX had failed to comply with the requirements of section 2-C and ordered that USX "hereafter provide notice of contracting out as required by Section 2-C."

The Union contends USX has not complied with Arbitrator Dybeck's order. USX itself has admitted both in grievance proceedings regarding actions taken after Arbitrator Dybeck issued his order and in its briefs and affidavits submitted to this court that it has violated the requirements of Section 2-C. *See* Arbitration Award in Grievance No. SFS-89-208 (exhibit L to Supplement Affidavit of Jackie Davis); Affidavit of Jerry L. Fuller. USX's admitted failure to comply with Section 2-C in some circumstances since Arbitrator Dybeck issued his order shows that USX has, in fact, violated Arbitrator Dybeck's order.

USX's violations of Arbitrator Dybeck's order do not, however, automatically entitle the Union to an injunction. The Union must also show that an injunction is necessary —that the harm in refusing to issue the injunction is greater than the harm in issuing the injunction. USX argues it complies with Section 2-C (and thus Arbitrator Dybeck's award) 98% of the time and that its "good faith" effort to comply makes an injunction unnecessary. Arbitrator Dybeck did not order USX to *try* to comply with Section 2-C. Arbitrator Dybeck ordered USX to comply—100% of the time. As both parties have argued in their briefs, the arbitration process is central to effective labor-management relations. It is, furthermore, a process strongly favored by Congress. *See Lincoln Mills, supra.* The failure of either party to comply with the award of an arbitrator strikes at the heart of the whole arbitration (and therefore labor-management) system. Where, as here, the failure appears to go beyond a single instance of non-compliance, the danger to the

system is increased. Thus, it appears the harm in issuing an injunction is significantly less than the potential harm in refusing to issue an injunction.[1]

USX argues, however, that balancing the harm is not sufficient to justify issuing an injunction in this case. In a very similar action, the Fifth Circuit concluded that the policy of non-interference with arbitration requires that before issuing an injunction in this context the court must satisfy a three-part test. First, the party seeking the injunction must show that the agreement has been violated. Second, the party opposing the injunction must be given the opportunity to show that an exception exists which justifies its conduct. Third, the party seeking the injunction must show that the alleged exception is merely a pretext. *Ethyl, supra.* The evidence shows that in at least one instance, USX failed to comply with Section 2-C, and thus with Arbitrator Dybeck's award, without any; justification for doing so.[2] Furthermore, this court will require the Union to satisfy the *Ethyl* test before it will issue any contempt citation pursuant to this injunction. Plaintiff's Motion for Summary Judgment is therefore GRANTED,[3] defendant's Motion for Summary Judgment is DENIED.

This the 15th day of March, 1990.

/s/ Sam C. Pointer, Jr.
United States District Judge

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[1] In this regard, it is important to note that if, indeed, USX complies with Arbitrator Dybeck's award in the future, USX will not be harmed by the existence of an injunction requiring it to comply.

[2] Negligence apparently is not a justification for failure to comply under the *Ethyl* standard.

[3] The Union has not pursued its original claim for damages, choosing to rely only on the injunctive relief sought.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Case No. CV 89-P-1483-S

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff;

-vs.-

USX CORPORATION,
Defendant.

ORDER

[Entered March 15, 1990]

For the reasons stated in the accompanying opinion, plaintiff's Motion for Summary Judgment is GRANTED; defendant's Motion for Summary Judgment is DENIED. USX Corporation is hereby ENJOINED and DIRECTED as follows:

Before it finally decides to contract out an item of work at the Fairfield Works, USX will provide notice of such intention to the Union members of the contracting out committee. Unless the item of work is one previously identified by the parties as a shelf item, such notice will be given not less than 25 days [1] before the work is to be done, unless emergency sitautions do not permit it. Such notice shall be in writing and shall be sufficient to advise

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[1] Twenty-five days' notice is necessary to give the Union sufficient time to permit the Union to invoke the Expedited Grievance Procedure described in paragraph G of the Collective Bargaining agreement.

the Union members of the committee of the location, type, scope, duration and timetable of the work to be performed so that the Union members of the committee can adequately form an opinion as to the reasons for such contracting out. Such notice shall generally contain the information set forth below:

1. Location of work
2. Type of work:
   a. Service
   b. Maintenance
   c. Major Rebuilds
   d. New Construction
3. Detailed description of the work
4. Crafts or occupations involved
5. Estimated duration of work
6. Anticipated utilization of bargaining unit forces during the period
7. Effect on operations if work not completed in timely fashion.

Completion of a form notice agreed to by the parties will satisfy the content component of this order.

Costs taxed against defendant.

This the 15th day of March, 1990.

/s/ Sam C. Pointer, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Case No. CV 89-P-1483-S

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff;

-vs.-

USX CORPORATION,
Defendant.

OPINION

[Entered April 3, 1990]

Defendant has filed a Motion to Alter, Amend, or Vacate the Judgment entered by this court on March 15, 1990. As written, the March 15 Order requires USX to provide notice of its intention to contract out day-to-day maintenance and repair work and service at least 25 days before the work is to be done. USX argues, and plaintiff concedes, that the contract does not require 25 days notice for day-to-day maintenance and repair work and service. Plaintiff argues that the contract requires at least 20 days notice for these items. Defendant argues the court should not impose a separate timing requirement for these items, but should place them in the same category as shelf items and emergency work for which notice is required but the timing of such notice is not set. The court agrees. Defendant's Motion to Alter, Amend or Vacate Judgment is GRANTED.

This the 3rd day of April, 1990.

/s/ Sam C. Pointer, Jr.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

Case No. CV 89-P-1483-S

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff;

-vs.-

USX CORPORATION,
Defendant.

AMENDED ORDER

[Entered April 3, 1990]

For the reasons stated in the accompanying opinion, defendant's Motion to Alter, Amend or Vacate Judgment is GRANTED. This court's March 15, 1990 order is hereby AMENDED. USX Corporation is ENJOINED and DIRECTED as follows:

Before it finally decides to contract out an item of work at the Fairfield Works, USX will provide notice of such intention to the Union members of the contracting out committee. Unless the item of work is one previously identified by the parties as a shelf item or involves day-to-day maintenance and repair work and service, such notice will be given not less than 25 days [1] before the work is to be done, unless emergency situations do not permit it.

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[1] Twenty-five days' notice is necessary to give the Union sufficient time to permit the Union to invoke the Expedited Grievance Procedure described in paragraph G of the Collective Bargaining agreement.

Such notice shall be in writing and shall be sufficient to advise the Union members of the committee of the location, type, scope, duration and timetable of the work to be performed so that the Union members of the committee can adequately form an opinion as to the reasons for such contracting out. Such notice shall generally contain the information set forth below:

1. Location of work
2. Type of work:
   a. Service
   b. Maintenance
   c. Major Rebuilds
   d. New Construction
3. Detailed description of the work
4. Crafts or occupations involved
5. Estimated duration of work
6. Anticipated utilization of bargaining unit forces during the period
7. Effect on operations if work not completed in timely fashion.

Completion of a form notice agreed to by the parties will satisfy the content component of this order.

Costs taxed against defendant.

This the 3rd day of April, 1990.

/s/ Sam C. Pointer, Jr.
United States District Judge

APPENDIX G

BOARD OF ARBITRATION

Case No. USS-26,733;
-26,734;
-26,735

February 7, 1989

ARBITRATION AWARD

Grievance No. SF-88-118
-88-119
-88-120

UNITED STATES STEEL CORPORATION
SOUTHERN STEEL DIVISION,
Fairfield Works

and

UNITED STEELWORKERS OF AMERICA,
Local Union No. 1013

Subject: Expedited Procedure Contracting Out Case

Statement of the Grievance:

"WE PROTEST MANAGEMENT CONTRACTING OUT M.E.O. WORK TO OUTSIDE CONTRACTORS (BMI) CEASE AND DESIST. PAY ALL MONIES AND [BENEFITS] LOST TO ALL AFFECTED EMPLOYEES. RETURN ALL WORK TO 1013 BARGAINING UNIT. NO CONTRACTING OUT NOTICE ISSUED."

Grievance Data: *Date*

Grievance Filed:	September 21, 1988
Appeal to Arbitration:	October 13, 1988
Received by Board:	October 17, 1988
Case Scheduled:	December 19, 1988
Case Heard:	January 25, 1989

Contract Provision Involved:

Section 2-C of the February 1, 1987 Agreement.

Statement of the Award:

The grievances are sustained to the extent set forth in Findings. The Company is ordered to hereafter provide notice of contracting out as required by Section 2-C. The matter of the spraying of troughs is returned to the Parties for further consideration as is the matter of monetary remedy.

BACKGROUND

In these grievances from Fairfield Works, appealed to Arbitration by the Company pursuant to Section 2-C-G of the Agreement, the Union protests the Company's use of contractor's Laborers and Mobile Equipment Operators to work in the Blast Furnace beginning September 11, 1988 as a violation of Section 2-C-A of the February 1, 1987 Agreement.

On September 6, 1988 the Company commenced blowing in the No. 8 Blast Furnace which had been under extensive rebuild for most of 1988. Several malfunctions occurred during this initial blow-in. Apparently some iron was produced because one of the problems was that several derailments occurred causing the loss of several ladles. More importantly for instant purposes, first one and then a second turbo-blower malfunctioned causing a thermal imbalance in the furnace. This resulted in gummy slag running out that first gummed everything

up and then broke loose and ran out. This was viewed as a crisis of major importance requiring that the runners be cleaned out immediately; otherwise, the furnace itself might freeze up. On September 11, 1988, pursuant to Management's instructions, B.M.I., a contractor, brought in a crew consisting of basically Laborers and Operating Engineers (Equipment Operators) who commenced cleaning up the area. The slag and iron had solidified but was still quite hot. The contractor's employees utilized picks, bars and other tools to loosen the slag and "grab buckets" and shovels to remove it.

According to the testimony of Mr. Cooper, Area Manager of Blast Furnace Operations, his initial thought was to use the contractor's employees, about 12 to 15 in number, for a couple of days. He stated that after 48 continuous hours the Blast Furnace was operational again but he kept a smaller number of contractor's employees there to clean up drain pipes and perform other functions. By September 17, 1988, the Blast Furnace was fully operational.

Mr. Cooper testified that the break out was an emergency and that he viewed the work involved as being part and parcel of the rebuild of the Furnace since the malfunction occurred during the initial blow-in and before the furnace was fully operational. He testified that all the experienced employees in the Blast Furnace were fully employed and maintenance personnel were working overtime. Not all the personnel were acquainted with hot side work. This was particularly true in the Stockhouse where personnel new to Blast Furnace operations were employed. The employees in the Q-BOP and Caster areas were themselves fully occupied in the blow-in of their equipment. No Labor Gang had been employed in the Blast Furnace since the 1984 start-up after a lengthy shutdown.

Evidence was adduced to show that during the period from September 11 through Friday, September 16 the

contractor employed Brickmason Tenders to the extent of 471 hours and Operating Engineers for 38.5 hours. Another Company witness testified that during the week in issue commencing September 11, 1988, the Blast Furnace Maintenance forces averaged 14.6 hours of overtime with refusals of overtime averaging 2.7 hours.

The Union adduced testimony to show that over the dates of September 11 through September 14, 1988 from 8 to 15 contractor's employees worked cleaning up the skimmers, slag troughs and runners. They were there one turn on the 11th, two turns on the 12th and 13th and three turns on the 14th. Thereafter, a lesser number of contractor's employees worked. On the 15th, 6 contractor's employees worked on B turn and 7 on C turn cleaning runners. On Friday the 16th, 7 contractor's employees worked on each of the B turn and C turn. On Monday the 19th, contractor's employees worked on two turns —5 on B turn and 8 on C turn. On the 20th, three men worked on C turn spraying troughs. On September 21 and 22, 4 or 5 contractor's employees worked on B turn using a jackhammer to remove a brick wall.

The Union contends that this is not just a protest against the use of the contractor to clean up the spillage as a result of the break out but also what it views as ongoing contracting out of essentially Laborer and Mobile Equipment Operator work through to time of hearing. It is noted that even after the alleged emergency was over the contractor remained on the premises performing work on the runners and troughs. It is stressed that since 1984 the Company has refused to employ Laborers. Testimony was adduced of meetings with Blast Furnace Supervision at or just prior to the filing of the instant grievances in which the Union noted to Management the failure to provide notice of the instant contracting out and the failure to have Laborers available and employed to perform the contracted out work.

The Union adduced further evidence that there have been spills in the past at the Blast Furnaces and on no

occasion has the Company called in a contractor to perform the clean-up work. In the past the work has been performed by Laborers or by Blast Furnace personnel and others such as employees from the Stockhouse if necessary.

Finally, the Union stresses that no notice was ever given the Union of the contracting out involved here. It notes that this is not the first time that the Board has been faced with a failure to give notice in contracting out situations at Fairfield Works. Therefore, the Union seeks a cease and desist order requiring that the Company hereafter provide notice of contracting out.

The Company argues first that the instant work, at least that performed on September 11, 12, 13 and 14, should be viewed as work covered by the major rebuild of the furnace which was properly contracted out. It notes that the breakout occurred as a direct consequence of the failure of the two turbo blowers which had been reconstructed during the outage. At the time of the failure and the breakout, the Blast Furnace was on its initial blow-in and not really operational. Thus, in light of the timing of the breakout and the circumstance under which it occurred, the Company urges that the work in issue be found to be part of the total rebuild of the furnace.

Assuming the Board should not agree with the above analysis, the Company argues that the work performed up through the 14th was clearly under emergency circumstances. The work had to be performed at that time and consumed a large number of manhours at a time when the Bargaining Unit was fully employed, working overtime and even refusing overtime. Thus, under any circumstances, no remedy would be available for the period through the 14th. For the period thereafter up through September 22, 1988 during which a lesser number of contractor's employees continued to work, the Company seems to concede that an overtime remedy might be available should the Board find that work was not part of the major rebuild.

FINDINGS

At the hearing a problem arose as to the extent that evidence should be received and considered of the presence of contractor's employees in the Blast Furnace after September 11, 1988. The Union asserts that this has been an ongoing problem and noted that the Complaint, dated September 21, 1988, stated the date of the alleged violation as "September 11, 1988 and continuing." The Arbitrator limited the Union's evidence to the period up to September 30, 1988, the date of the Company Summary of Facts and Arguments simply because it was apparent that any contracting out incidents after that date could not be adequately responded to or discussed by either Party.

One of the problems causing this sort of problem is that no contracting out notice was issued relating to the protested work involved herein. It is true that at least for the first several days after the breakout the clean-up work required was of an emergency nature. That fact, however, does not absolve the Company from providing notice to the Union. Under Section 2-C-E, an emergency situation may well absolve the Company from giving advance notice of the contracting out but that does not mean written notice is not required even under such circumstances. The notice provisions not only afford the Union knowledge of the contracting out but also provides the framework within which the Parties can consider the contractual issues that may arise under the notice. With no notice whatsoever, no such framework exists and, as here, the Parties from the outset were at odds as to how extensive the face presentation should be with the Union seeking to bring within the scope of this grievance all the contacting out of labor work that has allegedly occurred over the period of months at the Blast Furnace much of which the Parties clearly had not discussed under these grievances. At the other extreme, the Company sought to restrict the scope of the grievances to that period immediately around September 11, 1988.

Initially, the Company seeks to place the [sic] these instances of contracting out under the overall umbrella of the contracting out of the rebuild of the No. 8 Blast Furnace. It is true that the breakout occurred during the initial blow-in of the furnace and was a direct consequence of the malfunction of two turbo-blowers rebuilt during the outage. These facts, however, do not persuade that the work of cleaning up the spill should be viewed as part of the contracting out of the rebuild. It seems clear that the commencement of operations, as occurred here, could occur only after the contractor responsible for the rebuild had turned the furnace over to the Company for operation. A Company witness testified that he had been assured that the turbo-blowers were in operable condition. The fact that they apparently were not does not mean that the contracting out of the rebuild, presumably as a major reconstruction job under Section 2-C-B-c, somehow continued over to cover a breakout caused by a faulty repair. Furthermore, it was the Company, not the rebuild contractor, who took the responsibility for finding personnel to perform the cleanup. Under these circumstances, it cannot be concluded that the work in issue here was a part of the rebuild.

There can be no issue that the need to clean up the slag and iron from the breakout as quickly as possible represented an emergency situation. As noted above, however, this fact provides no excuse for failing to give any notice whatsoever under the Agreement. Under Marginal Paragraph 2.31 it simply excused giving advance notice of that portion of the work. Nor was any notice given for the portion of the work when some of the contractor's employees were retained to perform further clean-up work after the emergency had passed. Thus, the Company violated the notice provisions of Section 2-C of the Agreement.

All of the work involved here, with the possible exception of the spraying of troughs said to have been performed by the contractor on September 20, 1988, was

work capable of being performed by the Bargaining Unit as that term in Section 2-C-A has been interpreted by the Board. The exceptions to the basic prohibition make no reference to emergency work. There is no claim here that any of the work involved, except the spraying of troughs and some work on a brick wall was subject to a consistent practice under either Section 2-C-B-1-a or 2-C-B-1-b. Thus, it can only be concluded that the contracting out in issue violated the Agreement. The matter of the spraying of troughs is returned to the Parties for further discussion.

Also, there exists an issue related to work performed by the contractor on a brick wall. The Board is not persuaded that this was part of the rebuild. It appears from the testimony that the contractor removed the wall using pneumatic jackhammers. This more closely resembles Laborers' work than that of Bricklayers so the fact that the Bricklayers may have been at "bogey" under the Fairfield Works Agreement is viewed as irrelevant. The use of the contractor to perform this work on September 21 and 22 violated the Agreement.

There remains the matter of whether a monetary remedy is appropriate in this case. The evidence seems clear that all available employees were fully employed at the time and working some overtime. Although some overtime figures were submitted in evidence they were not complete. Thus, the matter of remedy will be returned to the Parties to review the availability of employees to have performed the work assigned to the contractor. To the extent it may be important to the Parties' discussions, it is the opinion of the Board that the emergency period extended no later than September 14, 1988. Consideration should be given to the Board's Award in USS-23,431 *et al* which discussed the monetary remedy problems that exist with respect to work contracted out under somewhat similar circumstances.

AWARD

The grievances are sustained to the extent set forth in Findings. The Company is ordered to hereafter provide notice of contracting out as required by Section 2-C. The matter of the spraying of troughs is returned to the Parties for further consideration as is the matter of monetary remedy.

BOARD OF ARBITRATION

/s/ Alfred C. Dybeck
ALFRED C. DYBECK
Chairman

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7313

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Plaintiff-Appellee,
versus

USX CORPORATION,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

[Filed October 14, 1992]

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and PECK *, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular ac-

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* Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

tive service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
United States Circuit Judge

APPENDIX I

AGREEMENT

between

USS
DIVISION OF USX CORPORATION

and the

UNITED STEELWORKERS
OF AMERICA

Production and Maintenance Employees

February 1, 1987

Pittsburgh, Pennsylvania

SECTION 2-C—CONTRACTING OUT

The parties have existing rights and contractual understandings with respect to contracting out. In addition, the following provisions shall be applicable to all contracting out issues arising on or after May 1, 1987.

A. Basic Prohibition

In determining whether work should be contracted out or accomplished by the bargaining unit, the guiding principle is that work capable of being performed by bargaining unit employees shall be performed by such employees. Accordingly, the Company will not contract out any work for performance inside or outside the plant unless it demonstrates that such work meets one of the following exceptions.

B. Exceptions

1. Work in the Plant

a. Consistent Practice Established Prior to March 1, 1983

Production, service, all maintenance and repair work, all installation, replacement and reconstruction of equipment and productive facilities, other than that listed in subparagraph B-1-c below, all within a plant, may be contracted out if the consistent practice, established prior to March 1, 1983, has been to have such work performed by employees of contractors.

b. Consistent Practice Established On or After March 1, 1983

Production, service, all maintenance and repair work, all installation, replacement and reconstruction of equipment and productive facilities, other than that listed in subparagraph B-1-c below, all within a plant, may be contracted out if

(i) the consistent practice, established on or after March 1, 1983, has been to have such work performed by employees of contractors and (ii) it is more reasonable (within the meaning of paragraph C below) for the Company to contract out such work than to use its own employees.

c. Major new construction, including major installation, major replacement and major reconstruction of equipment and productive facilities, at any plant may be contracted out subject to any rights and obligations of the parties which, as of the beginning of the period commencing August 1, 1963, are applicable at that plant.

As regards the term "new construction" above, except for work done on equipment or systems pursuant to a manufacturer's warranty, work that is of a peripheral nature to major new construction, including major installation, major replacement and major reconstruction of equipment and productive facilities and which does not concern the main body of work shall be assigned to employees within the bargaining unit when it is more reasonable to do so taking into consideration the factors set forth in paragraph C or it is otherwise mutually agreed.

2. Work Outside the Plant

a. Should the Company contend that maintenance or repair work to be performed outside the plant or work associated with the fabricating of goods, materials or equipment purchased or leased from a vendor or supplier should be excepted from the prohibitions of this Section, the Company must demonstrate that it is more reasonable (within the meaning of paragraph C below) for the Company to contract for such work (including the

purchase or lease of the item) than to use its own employees to perform the work or to fabricate the items.

Notwithstanding the above, the Union recognizes that as part of the Company's normal business, it may purchase standard components or parts or supply items, produced for sale generally ("shelf items"). No item shall be deemed a standard component or part or supply item if its fabrication requires the use of prints, sketches or detailed manufacturing instructions supplied by the Company or at its behest or it is otherwise made according to detailed Company specifications. With respect to such items, the Company may also purchase goods, materials, and equipment, where the design or manufacturing expertise involved is supplied by the vendor as part of the sale.

b. Production work may be performed outside the plant only where the Company demonstrates that it is unable because of lack of capital available in its USS Division to invest in necessary equipment or facilities. In determining whether there is capital to invest in particular equipment or facilities, the Union recognizes the Company's right to make reasonable judgments about the allocation of scarce capital resources among its plants represented by the Union and their supporting facilities.

3. Mutual Agreement

Work contracted out by agreement of the parties pursuant to paragraph F below.

C. Reasonableness

In determining whether it is more reasonable for the Company to contract out work than use its own employees, the following factors shall be considered:

1. Whether the bargaining unit will be adversely impacted.

2. The necessity for hiring new employees shall not be deemed a negative factor except for work of a temporary nature.

3. Desirability of recalling employees on layoff.

4. Availability of qualified employees (whether active or on layoff) for a duration long enough to complete the work.

5. Availability of adequate qualified supervision. Bargaining unit employees in team leader positions shall be considered in applying this factor.

6. Availability of required equipment either on hand or by lease or purchase, provided that either the capital outlay for the purchase of such equipment, or the expense of leasing such equipment, is not an unreasonable expenditure in all the circumstances at the time the proposed decision is made.

7. The expected duration of the work and the time constraints associated with the work.

8. Whether the decision to contract out the work is made to avoid any obligation under the collective bargaining agreement or benefits agreements associated therewith.

9. Whether the work is covered by a warranty necessary to protect the Company's investment. For purposes of this subparagraph, warranties are intended to include work performed for the limited time necessary to make effective the following seller guarantees:

    a. Manufacturer guarantees that new or rehabilitated equipment or systems are free of errors in quality, workmanship or design.

b. Manufacturer guarantees that new or rehabilitated equipment or systems will perform at stated levels of performance and/or efficiency subsequent to installation.

Warranties are commitments associated with a particular product or service in order to assure that seller representations will be honored at no additional cost to the Company. Long-term service contracts are not warranties for the purposes of this subparagraph.

10. In the case of work associated with leased equipment, whether such equipment is available without a commitment to use the employees of outside contractors or lessors for its operation and maintenance.

11. Whether, in connection with the subject work or generally, the local union is willing to waive or has waived restrictive working conditions, practices or jurisdictional rules (all within the meaning of "local working conditions" and the authority provided by this Agreement).

D. Contracting Out Committee

1. At each plant a regularly constituted committee consisting of not more than four persons (except that the committee may be enlarged to six persons by local agreement), half of whom shall be members of the bargaining unit and designated by the Union in writing to the plant management and the other half designated in writing to the Union by the plant management, shall attempt to resolve problems in connection with the operation, application and administration of the foregoing provisions.

2. In addition to the requirements of paragraph E below, such committee may discuss any other current problems with respect to contracting out brought to the attention of the committee.

3. Such commitee shall meet at least one time each month.

E. Notice and Information

Before the Company finally decides to contract out an item of work, the Union committee members will be notified. Except as provided in paragraph H below (Shelf Item Procedure), such notice will be given in sufficient time to permit the Union to invoke the Expedited Procedure described in paragraph G below, unless emergency situations do not permit it. Such notice shall be in writing and shall be sufficient to advise the Union members of the committee of the location, type, scope, duration and timetable of the work to be performed so that the Union members of the committee can adequately form an opinion as to the reasons for such contracting out. Such notice shall generally contain the information set forth below:

1. Location of work.
2. Type of work:
   a. Service
   b. Maintenance
   c. Major Rebuilds
   d. New Construction
3. Detailed description of the work.
4. Crafts or occupations involved.
5. Estimated duration of work.
6. Anticipated utilization of bargaining unit forces during the period.
7. Effect on operations if work not completed in timely fashion.

No later than May 1, 1987, Headquarters representatives of the parties shall develop a form notice for the

submission of the information described above. Either the Union members of the committee or the Company members of the committee may convene a prompt meeting of the committee. Should the Union committee members believe a meeting to be necessary, they shall so request the Company members in writing within five (5) days (excluding Saturdays, Sundays and Holidays) after receipt of such notice and such a meeting shall be held within three (3) days (excluding Saturdays, Sundays and Holidays) thereafter. The Union members of the committee may include in the meeting the Union representative from the area in which the matter arises. At such meeting, the parties should review in detail the plans for the work to be performed and the reasons for contracting out such work. Upon their request, the Union members of the committee will be provided relevant information in the Company's possession relating to the reasonableness factors set forth in paragraph C above. Included among the information to be made available to the committee shall be an opportunity to review copies of any relevant proposed contracts with the outside contractor. This information will be held in complete confidence by each involved Union representative. The Management members of the committee shall give full consideration to any comments or suggestions by the Union members of the committee and to any alternate plans proposed by Union members for the performance of the work by bargaining unit personnel. Except in emergency situations, such discussions, if requested, shall take place before any final decision is made as to whether or not such work will be contracted out.

Should the Company committee members fail to give notice as provided above, then not later than thirty (30) days from the date of the commencement of the work a grievance relating to such matter may be filed under the complaint and grievance procedure, except in the case of production, service or maintenance work contracted for performance outside the plant the thirty (30) day period

shall begin running when the Union becomes aware or reasonably should have known that such work has been contracted out. Should it be found in the arbitration of a grievance alleging a failure of the Company to provide the notice or relevant information in the Company's possession required under this paragraph E that such notice or information was not provided, that the failure was not due to an emergency requirement, and that such failure deprived the Union of a reasonable opportunity to suggest and discuss practicable alternatives to contracting out, the Board shall have the authority to fashion a remedy, at its discretion, that it deems appropriate to the circumstances of the particular case. Such remedy, if afforded, may include earnings and benefits to the grievants who would have performed the work, if they can be reasonably identified.

F. Mutual Agreement and Disputes

The committee may resolve the matter by mutually agreeing that the work in question either shall or shall not be contracted out. Any such resolution shall be final and binding but only as to the matter under consideration and shall not affect future determinations under this Section. In addition, an agreement, including a grievance settlement, reached prior to July 31, 1986 will continue in full force and effect provided that such agreement expressly permits future contracting out and in exchange for which the Company granted pensions under mutually satisfactory conditions or other substantial consideration (but excluding amounts expressly identified as backpay for loss of earnings or other benefits).

If the matter is not resolved, or if no discussion is held, the dispute may be processed further in accordance with either of the following:

1. By filing a complaint relating to such matter under the complaint and grievance procedure described in

Section 6 within thirty (30) days from the date of the Company's notice, or

2. By filing a grievance relating to such matter within five (5) days (excluding Saturdays, Sundays and Holidays) from the date of the Company's notice or the date of the contracting out meeting, whichever is later, and thereafter submitting that grievance to the Expedited Procedure as set forth in paragraph G, below.

G. Expedited Procedure

In the event that either the Union or Company members of the committee request an expedited resolution of a grievance arising under this Section, except paragraph H (Shelf Item Procedure), it shall be submitted to the Expedited Procedure in accordance with the following:

1. In all cases except those involving day-to-day maintenance and repair work and service, or emergencies, the Expedited Procedure shall be implemented prior to letting a binding contract.

2. Unless the parties agree otherwise, within five (5) days (excluding Saturdays, Sundays and Holidays) after the filing of a grievance, if either the Union or Company determines that the grievance cannot be resolved, either party (chairman of the grievance committee in the case of the local union and the manager of labor relations in the case of the Company) may advise the other party in writing that it is invoking arbitration under this Expedited Procedure and shall notify the Board. The party invoking arbitration shall include with its written notice a summary of the facts and arguments relied upon. Within five (5) days (excluding Saturdays, Sundays and Holidays) following receipt of such notice the responding party shall provide the moving party with a written summary of the facts and arguments that it relies upon.

3. An expedited arbitration must be scheduled within five (5) days (excluding Saturdays, Sundays and Holidays) of such notice to the Board and heard at a hearing commencing within ten (10) days (excluding Saturdays, Sundays and Holidays) thereafter. The Board, or its appointee, shall hear the dispute.

4. The Board must render a decision within five (5) days (excluding Saturdays, Sundays and Holidays) of the conclusion of the hearing, which decision need only succinctly explain the basis for the findings.

H. Shelf Item Procedure

1. No later than June 1, 1987, and annually thereafter, the Company shall provide the Union members of the committee with a list and description of anticipated ongoing purchases of each item which the Company asserts to be a shelf item within the meaning of paragraph B-2-a above. Either the Union members or the Company members may convene a prompt meeting of the committee to discuss and review the list of items and, if requested, the facts underlying the Company's assertion that such items are shelf items.

2. The committee may resolve the matter by mutually agreeing that the item in question either is or is not a shelf item. With respect to any item as to which the Union members of the committee agree with the Company's assertion that it is a shelf item, the Company shall be relieved of any obligation to furnish a contracting out notice until the next review following such agreement.

3. If the matter is not resolved, any dispute may be processed further by filing, within thirty (30) days of the date of the last discussion, a grievance in Step 2 of the complaint and grievance procedure described in Section 6. Such a grievance shall include all items in dispute.

4. An item which the Company asserts to be a shelf item, but which was not included on the list referred to above because no purchase was anticipated, shall be listed and described on a contracting out notice provided to the Union not later than the regularly scheduled meeting of the contracting out committee next following purchase of the item. Thereafter, the parties shall follow the procedures set forth in paragraphs 2 and 3 above.

I. Annual Review

Commencing on or before May 1, 1988 and annually thereafter, the Company committee members shall meet with the Union committee members for the purpose of (i) reviewing all work whether inside or outside the plant which the Company anticipates may be performed by outside contractors or vendors at some time during the following calendar year and for which no mutual agreement under paragraph F exists, (ii) determining such work which should be performed by bargaining unit employees and (iii) identifying situations where the elimination of restrictive practices or conditions would promote the performance of any such work by bargaining unit employees. The Union committee members shall be entitled in conducting this study to review any current or proposed contract concerning items of work performed by outside contractors and vendors and shall keep such information in complete confidence.

By no later than June 15 of each year these local union and Company members shall jointly submit a written report to the Union Chairman of USX Negotiating Committee and the Vice President of Employee Relations of USS Division or their designees. The report shall list those items on which the parties disagree. The report will state the reason for such disagreements.

As to individual items of work in dispute, the reviewing parties may (i) resolve the dispute, (ii) refer their

dispute to arbitration under a procedure to be established by the parties and the Board of Arbitration or (iii) refer the matters back to the plant without resolution in which event the specific disputes will be handled under the provisions of this section at the time they may arise.

J. District Director/Company Labor Relations Representative

It is the intent of the parties that the members of the joint plant contracting out committee shall engage in discussions of the problem involved in this field in a good-faith effort to arrive at mutual understanding so that disputes and grievances can be avoided. If either the Company or the Union members of the committee feel that this is not being done, they may appeal to the District Director of the Union who has jurisdiction of the plant in question and the appropriate representative of the Company Headquarters for review of the complaint about the failure of the committee to properly function. Such appeal shall result in a prompt investigation by the District Director or his designated representative and the Company's labor relations representative designated for such review. This provision should in no way affect the rights of the parties in connection with the processing of any grievance relating to the subject of contracting out.